

EXHIBIT 9

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

FOREST LABORATORIES, INC.,

Plaintiff,

v.

07 CV 07399 (AKH) (MHD)

LEIF NISSEN,

Defendant.

-----X

New York, N.Y.
October 4, 2007
10:10 a.m.

Before:

HON. MICHAEL H. DOLINGER,

Magistrate Judge

APPEARANCES

LAW OFFICES OF CHRISTOPHER SERBAGI

Attorneys for Plaintiff

BY: CHRISTOPHER SERBAGI

-AND-

FOREST LABORATORIES, INC.

BY: ERIC AGOVINO

FRIED FRANK HARRIS SHRIVER & JACOBSON

BY: JAMES DABNEY

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(In open court)

(Case called)

THE COURT: Good morning. I asked for this conference because of a dispute embodied in a September 25 letter from defendant's counsel. I'll be happy to hear from you, first of all, as to what the status of proceedings in this case happens to be; and then as to any matters you wanted to add to the letters that I've received.

MR. DABNEY: Your Honor, James Wilson Dabney, Fried Frank, for the defendant.

The status of the proceedings are as they were on September 7 when we were last before your Honor. The defendant served its first set of interrogatories and document requests on the plaintiff that afternoon; and the responses came in two

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15 weeks later, which have given rise to the matter here today.
16 The plaintiff has served its initial discovery on
17 Mr. Nissen; responses to those are due, I believe, tomorrow.
18 On September 21, Mr. Nissen filed a motion to dismiss
19 this action on grounds of lack of personal jurisdiction and
20 improper venue; and the Court has set a briefing schedule on
21 that motion which calls for the plaintiff to file its responses
22 coming Monday the 8th, and for any reply papers to be filed on
23 Monday the 15th of October. And I believe both sides are
24 working towards the discovery cutoff date which the Court set
25 of October 31 in this case.

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1 So that's essentially the status of the proceedings
2 from the defendant's point of view.
3 THE COURT: Okay.
4 MR. SERBAGI: Your Honor, this is Christopher Serbagi
5 for the plaintiff. And I'd like to note to the Court that all
6 this is quite unnecessary. The plaintiff has offered to
7 terminate the proceedings upon transfer of the domain name so
8 that we could alleviate the time and expense that this
9 proceeding is going to take, but they have not agreed to that;
10 they insist on proceeding with this case.
11 THE COURT: Well, I guess it's their right to do so.
12 In any event, let me ask this. With regard to the items listed
13 in Mr. Dabney's letter, specifically with respect to the first
14 one, that is, evidence of actual confusion, I take it that the
15 response, which seemed like kind of a nonresponse, other than
16 to allude to some surge, really indicates that at the present
17 time plaintiff does not have in its possession or control any
18 evidence of actual confusion, am I correct?
19 MR. SERBAGI: Your Honor, that is correct, with the
20 caveat that we have identified on the internet various
21 individuals who have submitted responses to web sites that show
22 that they were confused. We are in the process of
23 investigating some of that actual confusion that we've seen on
24 the internet.
25 THE COURT: Then I'm really confused, too, although
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1 not by the nature of the confusion that's being litigated in
2 this case.
3 I had understood you to say in your letter response
4 that "Forest cannot identify their names and addresses now
5 because it is not in our possession."
6 It's a little bit unclear what the reference is when
7 you refer to names and addresses, but if you are investigating,
8 I take it you have a body of information on the basis of which
9 you are investigating.
10 MR. SERBAGI: Your Honor, we have nothing in our
11 possession which was of the names or addresses of any of these
12 individuals. What I meant to say in this response is that we
13 are going to get information as to those individuals. And when
14 we do, we'll certainly turn it over. There's absolutely no
15 documentation we have that would be responsive to this
16 interrogatory.
17 THE COURT: Well, let me ask this: What is it, when
18 you refer to this internet search, that whoever did the
19 internet search actually observed on the internet, and also how

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20 is that search done?

21 MR. SERBAGI: We typed in the name "Lexipro" as part
22 of a Google search, and many references came up.

23 THE COURT: Lexipro with --

24 MR. SERBAGI: With an "i."

25 THE COURT: With an "i."

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1 MR. SERBAGI: And I believe, your Honor, that a
2 printout of that web site was produced in connection with our
3 initial papers on the pretrial memorandum and the affidavits
4 submitted in connection with the TRO. So that printout has
5 been produced.

6 THE COURT: And that, no doubt, is the sole body of
7 information currently available to your client.

8 MR. SERBAGI: That is the sole body of information
9 available to us, your Honor. Had we had anything else, we most
10 certainly would have produced it.

11 THE COURT: Okay. Did you, in fact, receive that
12 printout?

13 MR. DABNEY: I believe the printout was an attachment
14 to an affidavit dated August 28, I believe, of Mr. Agovino in
15 this case; so it was part of the pretrial submissions that were
16 filed. So, yes, I do have the Google search report that
17 apparently was generated a week after calls to lexipro.com
18 stopped being answered. So, yes, I do have that, but it would
19 not have occurred to me before this morning that that would
20 have been argued to be evidence of actual confusion caused by
21 Mr. Nissen.

22 THE COURT: Let me ask you this, because it sounds as
23 if, and perhaps I'm wrong, the two sides hadn't really spoken
24 about this issue, because otherwise I assume this discussion
25 that I was having with plaintiff's counsel would have been, in

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1 effect, conducted by counsel, between themselves, and that
2 information would have come to light.

3 Putting aside whether it should have been disclosed
4 anyway before, but has this been a topic of discussion?

5 MR. SERBAGI: Your Honor, may I answer it? I did
6 receive a call from Mr. Dabney's associate who very briefly
7 raised these issues with me. And she didn't ask me any
8 questions that you asked me.

9 And what I told the associate was that we had produced
10 everything that we have on this issue. There is nothing in our
11 possession, custody, or control responsive to evidence of
12 actual confusion. And that was the end of the conversation.
13 She moved onto another topic, and so I tried to explain that we
14 had nothing.

15 THE COURT: Okay. Well, I think since the
16 representation has been made on the record by plaintiff's
17 counsel, that will be sufficient for purposes of, indeed, in
18 effect, in supplementation of an interrogatory answer, that we
19 leave that matter as it is for now.

20 With regard to the next item in Mr. Dabney's letter,
21 that is, a request for plaintiff to state a month and year in
22 which it contends that its mark became famous. I know that
23 plaintiff says now it has disavowed any intention to rely upon
24 the fame of the mark, and on that basis it says that it's

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25 irrelevant. It goes on, and plaintiff does go on to submit
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1 some reference to the burden of producing all sorts of
2 documents. The only complaint voiced in Mr. Dabney's letter
3 was with regard to the failure to answer the interrogatory;
4 that is, asking month and year of when fame attached to this
5 trademark.
6 So I think the burden issue is irrelevant on that.
7 If, in fact, however, the plaintiff did rely on the contention
8 that the mark was famous at a particular point in time in
9 arguing for, I believe it was, a temporary restraining order is
10 that -- yes, that's what it was, before the district court,
11 that notwithstanding its, in effect, massaging of its claims,
12 that the defendant is entitled at least to a representation,
13 perhaps slightly different from what it's asking for, as to
14 whether the plaintiff contends that as of the relevant time,
15 which I believe in Mr. Dabney's letter indicates January 2002,
16 the mark was famous.

17 If, in fact, by virtue of whatever amendment you say
18 you made it is agreed by both sides that the purported fame of
19 the mark is irrelevant or, more to the point, that the
20 plaintiff will not contend in any respect in this case and
21 offer no evidence that the mark has any fame, then I think any
22 additional inquiry into this area would be unnecessary.

23 So let me find out from you quite clearly, does the
24 plaintiff represent at this time that it will make no
25 contention that the mark has fame, and will not offer any

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1 evidence that the mark has any fame in this case?

2 MR. SERBAGI: We do so represent.

3 THE COURT: Okay. Under those circumstances,
4 Mr. Dabney, other than having the plaintiff make the
5 representation that it contended, at least for purposes of a
6 temporary restraining order, that the mark was famous back in
7 January 2002, is there any basis for pursuing this matter?

8 MR. DABNEY: Well, this ties into our request for
9 documents relating to the extent of public awareness of the
10 trademark. We've tried to be very selective in our discovery
11 requests that we have put in this case. But as your Honor is
12 aware, the extent to which a mark is known, whether it is
13 extremely well-known and famous, or somewhat well-known, is a
14 factual continuum that bears on all of the plaintiff's claims
15 in this case, not just its now abandoned dilution claim.

16 THE COURT: Well, we're not, at this stage, dealing
17 yet with surveys about awareness. And to the extent that
18 levels of public awareness may be relevant to one or another
19 claim or defense, we can deal with that when we come to that
20 point.

21 MR. DABNEY: Okay.

22 THE COURT: My question is solely with regard to the
23 question of fame as such.

24 MR. DABNEY: It seems to me that if the plaintiff had
25 any basis for the representation that it made and the claim

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1 that it made, we would be entitled to know what that was, and
 2 we don't have to accept their explanation that the reason why
 3 they have now retracted their contention was "to simplify the
 4 discovery and trial process." That's the statement made in
 5 their letter in the first sentence in response on the evidence
 6 of fame.
 7 It seems to me that if, in fact, the plaintiff fully
 8 well knew that the mark was not famous in January 2002 and
 9 nevertheless so represented to the Court in response to a
 10 pointed question, when there was absolutely no basis for it, it
 11 seems to me that we would be entitled to more than a
 12 representation that they will not make the contention without
 13 having acknowledged that the original contention was untrue.
 14 THE COURT: That may well be true. But I am taking
 15 you at your word as to what you're asking for in your letter.
 16 And in your letter what you asked for is an answer to
 17 interrogatory No. 4 insofar as it asks from the plaintiff to,
 18 and I quote from your letter, "state the month and year in
 19 which plaintiff intends that the mark Lexapro," with an "a,"
 20 "became a 'famous' trademark of the United States."
 21 And as far as I can see, I mean that's not really a
 22 very meaningful inquiry, other than insofar as it would trigger
 23 an answer that would post-date January 2002. And hence, I have
 24 suggested, I will order, that the plaintiff respond to the
 25 interrogatory as rewritten by me to ask whether they contend
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1 that the mark was famous by no later than January 2002.
 2 If there are other issues about fame and things you
 3 want to deal with, take it up with the other side; but at the
 4 moment it seems to me we're dealing with, if not a dead horse,
 5 a horse that is mortally wounded.
 6 So let's go on to the next point.
 7 That is damages disclosure. Now, I understand from
 8 plaintiff's response that they are, in fact, going to seek only
 9 statutory damages, and will seek the statutory maximum of
 10 \$100,000. That's, in fact, the case?
 11 MR. SERBAGI: That is correct, your Honor.
 12 THE COURT: Okay. It seems to me once they choose,
 13 whether early or late, to waive any other claim for damages,
 14 there's no need for them to calculate damages that they will
 15 not seek. And they will, of course, be precluded from seeking
 16 such damages or offering evidence in support of such damages.
 17 MR. DABNEY: Your Honor, if I can just say, when we
 18 propounded the interrogatories, we fully well knew what relief
 19 the plaintiffs were seeking. What we were trying to find out
 20 was what injury, loss, or damage they have suffered that would
 21 be the basis for seeking relief, statutory or otherwise.
 22 So interrogatory No. 5, which is obviously understood
 23 by them, as reflected in their response, was to focus to their
 24 injury as opposed to the relief that they are seeking.
 25 So ordinarily in a trademark case like this, if you're
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1 going to seek actual damages or seeking compensatory damages,
 2 whether statutory or actual, they've got to be tied to some
 3 actual loss. And so what this interrogatory is intended, and
 4 it ties into the actual confusion interrogatories in this
 5 circuit, in order to recover money damages of any kind in a
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6 trademark case there's got to be actual confusion somewhere.
 7 So we are just trying to get them nailed down on whether they
 8 have, in fact, suffered a dime of loss so that in deciding
 9 whether any level of statutory damages is appropriate, the
 10 Court can take into account that, in fact, they have no actual
 11 loss.

12 THE COURT: Well, not to split hairs too finely, which
 13 is always an introduction that's starting to split hairs, I
 14 know, what you've asked for in the interrogatories was a
 15 computation of damages. And I think when a party offers
 16 statutory damages, it is not obliged to do a computation,
 17 particularly in an area where computation is likely to be
 18 difficult, if not impossible, to do.

19 What I think you are entitled to is any evidence of
 20 injury that would be pertinent to a calculation of statutory
 21 damages, which I think probably in shorthand translates into
 22 any evidence that the plaintiffs might be prepared to
 23 potentially use to demonstrate that there was some sort of
 24 impact from the defendant's conduct on the plaintiff's mark and
 25 business.

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1 In addition, and I think this is apart from
 2 calculation of damages, to the extent that there are any
 3 documents that would reflect an absence of impact, those
 4 documents necessarily would have to be used, as well. And so
 5 to that extent, and if it hasn't been otherwise requested in
 6 some other document request, that universe of documents needs
 7 to be provided.

8 Now, the next item has to do with the so-called
 9 Lexipro, with an "i," references that plaintiff may have. And
 10 there seems to be some question between the two letters I have
 11 received as to the basis for limiting production, if, in fact,
 12 plaintiffs limited production or limited their searches. And
 13 so I think probably it would be helpful at this point for
 14 counsel simply to indicate, No. 1, what was produced; and No.
 15 2, what was searched for and how.

16 MR. SERBAGI: Your Honor, as I told Mr. Dabney's
 17 associate over the phone in the meet-and-confer before the
 18 conference today, we've produced every document responsive to
 19 this request in our possession, custody, and control. The way
 20 we determined that we did that is we had the relevant employees
 21 at Forest who knew about this issue search their files, both
 22 their hard copies and their computer files, and we produced
 23 what we have.

24 So I don't understand why we are even here on this
 25 issue, because we've made a representation that we've given

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1 them what we had, and there's no reason for them to believe
 2 that we haven't.

3 THE COURT: Under these circumstances, on the
 4 assumption from Mr. Dabney's letter that he has a suspicion
 5 that the search or at least the production was only partial or
 6 to put it another way gently, that he has some questions about
 7 the precise accuracy of the representation that he received
 8 from you, defendant is free, as defendants traditionally are,
 9 to take a deposition if they wish of someone who would be in a
 10 position to describe the nature of the search and the way in

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11 which documents are retained at plaintiff in order to satisfy
12 himself that the production was, in fact, complete.
13 MR. SERBAGI: And your Honor, I'll just note for the
14 record we had two weeks to respond to the request; and we will,
15 out of an abundance of caution that our representations are
16 fully accurate, continue to search the records and documents to
17 make doubly sure that we've given everything that we are
18 obligated to give. So I'll just say that we reserve the right
19 to supplement, if we do find something, but we will continue to
20 check. But we have no reason to believe that everything hasn't
21 been turned over.

22 THE COURT: Okay. Well, again, I think the obligation
23 to make a complete search involved an obligation to do so
24 within the time frame.

25 If what you're suggesting is that there may be a
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1 decision by your client to research some of the places that
2 were already searched, that's fine. But if, in fact, the
3 search was only a partial one up to now, that's a bit more
4 troubling. But I am sure that if the search was not complete
5 it will be complete within the next couple days. Either way.

6 MR. SERBAGI: I have no reason to believe it wasn't as
7 complete as possible.

8 THE COURT: Okay. Fine.

9 MR. DABNEY: Your Honor, if I could just make clear
10 that we believe the search should include the entire period of
11 time covered by the complaint, from 2002.

12 THE COURT: Well, my assumption, and perhaps it was an
13 overly optimistic or naive assumption, is that the search was
14 not limited to some artificially narrowed time frame.

15 MR. SERBAGI: The search was not limited to any time.

16 THE COURT: And counsel's representation was not so
17 hedged. So I think we're clear, at least on the record, as to
18 the scope of the search, and you may pursue this further, if
19 you wish, by other means.

20 MR. DABNEY: I'll just note one of the documents that
21 they did produce that was very recent indicated that they have
22 had correspondence with Yahoo with regard to the payment of
23 money by them for rankings of Lexipro, with an "i." And we
24 certainly would have expected, in view of that, that their
25 production would have included correspondence and other

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1 documents that reflect their own commercial dealings and
2 involvement with this letter string.

3 THE COURT: With what?

4 MR. DABNEY: The letter string, with the letter
5 string. Lexipro, L-e-x-i-p-r-o.

6 THE COURT: Oh. Well, I think we're going to have to
7 leave it where it is. And if you want to probe further into
8 this possible mystery, you're free, as I say, to do so.

9 The last item in Mr. Dabney's letter concerns the
10 survey evidence question. And Mr. Dabney, it might be helpful
11 at this point, given our earlier discussion about the
12 withdrawal of any suggestion of fame by the plaintiff, what the
13 relevance of such survey evidence would be to put now in the
14 case.

15 MR. DABNEY: One of the fundamental aspects of a claim
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16 of trademark infringement is the strength of the trademark,
 17 which is not merely a function of its arbitrariness, but is
 18 also a function of the extent to which the public is aware of
 19 it. This relates both to liability in this case, as well as to
 20 what appropriate recommendation might be awarded if, in fact,
 21 it turns out that there's extremely low public awareness of
 22 this prescription drug that only physicians can prescribe, and
 23 certainly I have heard of it when the suit was filed.

24 So to the extent that they have actually tested the
 25 hypothesis, the papers in this case are shot through with

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1 assertions that the mark originally was famous, was well-known,
 2 he must have known, must be bad faith because it's so
 3 well-known, there couldn't be any possible plausible reason he
 4 would have done this. It seems to me that the evidence itself
 5 bears directly on the merits of their own claims in this case,
 6 No. 1. And No. 2, surely, if the conduct that the defendant
 7 was causing confusion, this is a likely place where any impact
 8 of such confusion would be reflected.

9 To the extent that they are able to conduct survey
 10 research of public awareness of their mark and they don't
 11 encounter confusion, it is evidence that tends to show that, in
 12 fact, they've suffered no injury, loss, or damage in this case.
 13 So on any number of levels, their complaint places an issue
 14 over and over again the proposition that this survey evidence
 15 directly tests.

16 THE COURT: What is the basis for the objection to
 17 proffering of the survey evidence?

18 MR. SERBAGI: Your Honor, the defendant's
 19 representations now are substantially different from what is
 20 stated in his letter here. He states in his letter, for the
 21 same reasons given in the evidence of fame, paragraph above,
 22 survey evidence showing the degree to which the trademark
 23 Lexapro was or was not well-known or famous, bears directly on
 24 the issues.

25 So the representation is that for the same reasons
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1 that the issue of fame is relevant, the issue of survey is
 2 relevant.

3 THE COURT: Well, not to parse it too finely, No. 1,
 4 for substantially the same reasons, and I suspect perhaps that
 5 he felt so confident about the strength of his argument about
 6 fame before he learned that you were doing away with the fame
 7 issue, that he focused on that.

8 If, however, the evidence at this time is relevant to
 9 other issues, he's certainly not prevented from arguing that
 10 point now, nor am I prevented from considering it.

11 So my question is are you saying that it is completely
 12 irrelevant to any issue in this case?

13 MR. SERBAGI: Your Honor, it's our affirmative
 14 obligation in the case to put forward the evidence of the
 15 strength of the mark, whether there's confusion in the
 16 marketplace, whether there's actual confusion. This is very
 17 similar to the actual confusion issue.

18 If we don't put on evidence of actual confusion, then
 19 we're not entitled to represent in court that there is actual
 20 confusion. If we don't produce survey evidence to show that

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21 the mark was strong, then that is our affirmative decision not
22 to put that evidence before the Court. But it's not relevant
23 to any of the defendant's defenses.

24 THE COURT: Wait a minute. Relevance from the
25 perspective of what the defendant can ask for in discovery is

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1 not limited to potential affirmative defenses of the defendant.
2 It encompasses evidence relevant to any of the contentions of
3 the plaintiff, if, in fact, as you seem to be conceding, part
4 of the plaintiff's potential case goes to the strength of the
5 mark which in turn implicates public awareness. And it seems
6 to me you have effectively defined an area of relevance that
7 encompasses such survey evidence.

8 MR. SERBAGI: Your Honor, based on what the Court is
9 saying to me now and the new reasons for this type of
10 documentation, I don't believe that Forest objects to producing
11 these documents.

12 THE COURT: Okay. Good. Now, I think that leaves us
13 with one other item. And I have to confess, that in reading of
14 this matter in the second letter that I got, that is, from
15 plaintiff's counsel, my eyes glazed over because it seemed to
16 be a suggestion that for reasons too complicated for me at the
17 time, perhaps without enough caffeine in me, to grasp, we
18 should take up the possibility of defendant withdrawing its
19 motion to dismiss or having it denied out of hand or something
20 like that. Perhaps you can tell me what it was I had
21 difficulty understanding here, and what it is you're seeking
22 other than not having to have the motion to dismiss
23 adjudicated.

24 MR. SERBAGI: Well, your Honor --

25 THE COURT: An outcome, by the way, which, of course,
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1 the courts as an institutional matter always favor, but I can't
2 always bring about.

3 MR. SERBAGI: Your Honor, to save the time and expense
4 of briefing the jurisdictional issue, I wanted to raise to the
5 Court an issue that we discovered in our research on the
6 jurisdictional issue.

7 The defendant in this case, prior to the litigation,
8 made a number of offers to Forest, I should say demands, to pay
9 him money to receive for us to retain the trademark, the main
10 name back. And this was extortion.

11 And Mr. Dabney in a prior case had argued before the
12 same judge, Hellerstein, that those types of offers from an
13 out-of-state defendant constituted jurisdiction in this
14 district because there was a tort committed. And in this case,
15 the representation is directly opposed to that. And so I
16 wanted to raise the issue.

17 THE COURT: Well, I'm familiar with the concept of law
18 of the case. This is a somewhat original, although, in my
19 experience, not entirely unprecedented argument. It seems to
20 press for a theory of law of the attorney; that is, if an
21 attorney in a prior case has argued one side of an issue, he
22 shall forever after be precluded from arguing the other side of
23 the issue, even for a different client.

24 I'm not aware of any legal authority for that
25 proposition, and I suspect attorneys as a practical and

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1 professional matter would have difficulty with that.

2 In any event, to the extent that you could think of
3 analogous theories, I suppose the other one would be judicial
4 estoppel. But judicial estoppel, as I understand it, is
5 limited to situations in which a particular party has taken a
6 position, and not only taken a position, but has succeeded
7 based on that position in persuading the Court to rule in its
8 favor, and then subsequently in another case takes the opposite
9 position.

10 I take it that your reference to whatever it was that
11 was argued in another case which does not seem to involve
12 Mr. Nissen made an argument, but it doesn't even tell me if he
13 succeeded based on that argument. So I'm not sure where we're
14 going with all of this.

15 Obviously, if you can convince Mr. Dabney that this is
16 all a waste of his client's time because the law is clearly
17 against him, I encourage you to talk to him. But beyond that,
18 I don't know what I'm supposed to do with this really.

19 Is there anything else we should deal with at this
20 point? Thank you.

21 MR. DABNEY: Thank you, Judge.

22 MR. SERBAGI: Thank you, Judge.

23 THE COURT: Have a great rest of the week and a good
24 weekend all.

25

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